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No. 06-1510

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In The

Supreme Court of the United States

WESTFALIA-SURGE, INC.,

Petitioner,

vs.

MARIPOSA FARMS, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUES PRESENTED

Is the United States Court of Appeals for the Tenth Circuit's unpublished opinion in this state law product liability case worthy of a writ of certiorari even though it presented no doctrinal, and no federal, question?

Is there some inconsistency among the Circuits involving expert evidence and receipt of differential diagnoses by treating physicians, or in this case veterinarians, that requires reconciliation by the United States Supreme Court?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent informs the Court it has no parent company. No publicly traded company holds more than 10% of the stock of Mariposa Farms, L.L.C.

No disclosures are required by Supreme Court Rule 29.6.

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RULES INVOLVED

Fed. R. Evid. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts in the case.

STATEMENT OF THE CASE

Mariposa Farms, L.L.C. ("Mariposa"), a commercial dairy, sued Westfalia-Surge, Inc. asserting its milking machine's vacuum and pulsation systems were improperly designed, installed, and manufactured. As a result, an organism causing mastitis lived inside the milking machine, and passed from cow to cow and, within cows from udder to udder, and through the milk stream. The milking machine's process caused reverse negative pressures, which allowed small volumes of milk to enter into the teat canal, instead of forcing milk to flow only out of it. This allowed the destructive, flesh eating organism to invade the animals.

Two expert witnesses testified in support of Mariposa's claims at trial: Sybren Y. Reitsma, PhD., and Robert Corbett, D.V.M.

Sybren Y. Reitsma, a professional mechanical engineer who devoted his life to studying milking systems, provided extremely limited testimony based exclusively on photographs, diagrams and telephone interviews without a site inspection or tests. This data, however, was sufficient to allow the engineer to see four inch diameter lines abruptly narrowed to a two inch aperture, restricting air flow, and causing variability in air pressures. Reitsma was definite and unequivocal in his awareness this condition overtly caused dangerous circumstances permitting the milking machine's vacuum system to function improperly, and harm the cows. Reitsma's testimony was allowed at trial, then disallowed on posttrial motions, but the trial court held a second expert witness' testimony provided ample proof.

The second witness, Robert Corbett, D.V.M., a veterinarian, devoted his entire professional life exclusively to treating dairy animals. He testified, based on his scientific testing of milk drawn from udders of the diseased cows, his observations of the dairy and its animals, his familiarity with mastitis and the bacteria causing it, his service on the National Mastitis Council and his vast experience. Dr. Corbett also relied upon his awareness of milking machines, their impact on mastitis, and their role in the disease's development and spread. He concluded that defective milking machine installation and inappropriate vacuum design and installation, along with improper vacuum service by Westfalia-Surge personnel, were the proximate causes of herd-wide mastitis, animal death, and dramatic milk loss in the Mariposa operation.

The Tenth Circuit Court of Appeals affirmed the trial court's decision, and entered judgment for Westfalia-Surge. It upheld the trial court's holding relying on basic

rules. A part of the Court of Appeals analysis is described in the petition for writ of certiorari at pages 5 through 7.

REASONS FOR DENYING THE PETITION

The Supreme Court's review of this state law case is not warranted. This case does not present either:

a) A need to reconcile inconsistent decisions among the circuits; or

b) A decision on an important question of Federal Law that has not been, but should be, settled by the Supreme Court.

Westfalia-Surge's petition asserts its view of the need to correct what it considers erroneous factual findings or the misapplication of a properly-stated rule of law. These are not reasons to grant certiorari. S. Ct. R. 10. What is more, no error requires correction.

Petitioner wants to eliminate the "best inference" analysis approved by the Tenth Circuit, by suggesting it be restricted to physicians and medical diagnoses, but prohibited for veterinarians and diagnoses concerning animal health. This case presents a poor vehicle for analyzing the best inference doctrine because it lies so close to medical practice.

No Doctrinal Issue is Present

No Conflict Exists Among the Circuits

The Court of Appeals' Opinion adhered to its prior holdings that expert witnesses must, at times, make differential findings based on the best inference they can deduce from available evidence. In this case, a veterinarian did so. Petitioner concedes physicians must do so in making differential diagnoses, but complain a veterinarian, treating medical conditions in food-producing animals including dairy cows, should not.

There is no inconsistency between *Bitler v. AO Smith Corp,* 400 F.3d 1227 (10th Cir. 2004), and the *Mariposa* decision. The Tenth Circuit did not err in applying its own precedent.

The best inference language of the Tenth Circuit is nothing more than a requirement that a physician or veterinarian, or other professional, make a differential diagnosis or analysis. Differential diagnoses are routinely recognized and received in evidence. No split in the circuits exists in this regard.

> *Comer v. Schriro*, 463 F.3d 934, 944 (9th Cir. 2006) (holding court-appointed expert had made differential diagnoses of petitioner's various apparent depressive episodes, and attested to such diagnoses with confidence);
>
> *Mattis v. Carlon Elec Products*, 295 F.3d 856, 860 (8th Cir. 2002) (differential diagnosis used by pulmonologist was legally sufficient to establish exposure to organic solvent caused reactive airway dysfunction syndrome; "a medical opinion based upon a proper differential diagnosis is sufficiently reliable to satisfy *Daubert*.");

Hollander v. Sandoz Pharmaceutical Corp, 289 F.3d 1193, 1205 (10th Cir. 2002) (by relying on professional publications, scientific principles, animal studies, differential diagnoses, and case reports, experts did what *Daubert* required);

Zuchowicz v. United States, 140 F.3d 381 386-87 (2d Cir. 1998) (differential diagnosis based partly on scientific articles regarding effect of drug approved); and

Clausen v. M/V New Carissa, 339 F.3d 1049, 1057-59 (9th Cir. 2003) (farm owners' expert permissibly included low-level toxic effects of oil as possible cause of oysters' death in differential diagnoses).

Many courts have approved differential diagnoses where the expert demonstrates the ability to rule out other possibilities:

Lauzon v. Senco Products, Inc., 270 F.3d 681, 693 (8th Cir. 2001) (an expert's causation conclusion should not be excluded because he or she has failed to rule out *every* possible alternative cause);

Hardyman v. Norfolk & Western RY Co., 243 F.3d 255, 261 (6th Cir. 2001) (exclusion of worker's expert testimony based on differential diagnosis was abuse of discretion);

Westberry v. Gislavedgummi AB, 178 F.3d 257, 262-66 (4th Cir. 1999) (differential diagnosis, which is standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated, has widespread acceptance in medical community and provides a valid foundation for an expert opinion); and

> *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043-44 (2d Cir. 1995) (district court did not abuse discretion in ruling that opinion on causation was admissible, where opinion was based on care and treatment of plaintiff, medical history, pathological studies, product's safety data sheet, reference to scientific and medical treatises, expert's training and experience, as well as differential diagnosis).

There is no confusion among the circuits about the best inference, or the process of differential diagnosis. A medical condition was at issue here; the patients were cows, not people. Testimony from the treating expert that there is no explanation other than the communication of staph aureus bacteria from cow-to-cow through the milking system explains herd-wide staph aureus infection like that present at the Mariposa farm. This testimony was sufficient to establish causation which the jury found was present. The testimony was buttressed by other testimony including extensive admissions from Mariposa's dealer's file and its own file, confirming that the milking system was incorrectly installed.

There is nothing appealing, from the perspective of Supreme Court jurisprudence, about this case's potential use as a vehicle for expressing new legal doctrine, or reconciling Circuit Court inconsistencies. There is also no error present requiring correction.

CONCLUSION

The petition for writ of certiorari is not well founded. It should be denied.

Respectfully submitted,

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